(12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARTIN A. HIRSCH, *Petitioner,*
against
UNITED STATES OF AMERICA, *Respondent.*
No. 260

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

LORING M. BLACK,
MILTON SCHILBACK,
Attorneys for Petitioner.

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Argument

1. A fundamental problem never passed on by this Court is presented by the instant case.

Respondent in its brief in opposition attempts to make petitioner's posting of bail for Circella a "highly unusual story" (Respondent's Brief in Opposition, pp. 8-9, footnote). The details of the transaction show that it was not in the least unusual. Petitioner explained in detail before the Grand Jury that he had posted bail for Circella at the request of Mrs. Circella and a friend, Joseph Rogers, who had agreed to make good any loss and who had held out the prospect of substantial future business to petitioner who is an accountant and tax consultant (fols. 138, 143, 153-154). In addition, Circella had just surrendered himself to the authorities (fols. 152-153) and the risk of loss was negligible. Petitioner's consent to

the retention by the Government of $10,000 was after consultation with an attorney (fol. 162) and was required by then existing judicial authority (see Petition, p. 4).

Respondent argues that the mere posting of bail by petitioner made his personal finances a subject of inquiry material to the Grand Jury investigation under the Anti-Racketeering Act. It is argued that it would even have been material to the Grand Jury investigation to inquire "into the sources of the other cash he had in his safe deposit box to determine whether it, too, was part of the proceeds of the extortion scheme" (Respondent's Brief in Opposition, p. 10). This claim is made although admittedly the posting of bail for Circella is the only connection petitioner had with the persons being investigated by the Grand Jury. In addition, it is made in spite of the fact that the only evidence in the whole record on the source of the $25,000 Circella bail is petitioner's testimony before the Grand Jury that the money was his own. There is no evidence of any nature that the $25,000 or any part of it came from any other source or had any connection with the extortion proceeds.

Under the theory of respondent, the element of materiality is removed from the perjury statute. Any person may be called before a Grand Jury and interrogated about his personal finances. That inquiry can then be justified as material by the claim that the Grand Jury, although it had no proof, suspected that the witness's finances had some connection with the crime it was investigating. If the test of materiality is satisfied by the unrestricted imagination of grand juries, that element of the crime is removed from the perjury statute.

It is respectfully submitted that this Court should finally determine the test of materiality in Grand Jury proceedings.

2. A conflict exists between the instant case and the decision in *Clayton* v. *United States* (C. C. A. 4, 1922), 284 Fed. 537.

Respondent attempts to reconcile the decision in *Clayton* v. *United States* (C. C. A. 4, 1922), 284 Fed. 537, with the decision in the instant case (Respondent's Brief in Opposition, pp. 10-11, footnote). The intoxication of Clayton admittedly was not an offense under the Prohibition Act so as to constitute an independent subject of investigation. Likewise, the existence or non-existence of a $5,000 loan by petitioner to Leo Levy was not an offense under the Anti-Racketeering Act so as to constitute an independent subject of investigation.

Respondent's argument that Clayton's false testimony did not bear a direct and intimate relation to the subject of the Grand Jury's inquiry, while petitioner's did, is untenable. Respondent attempts to justify materiality in the instant case by arguing that petitioner's testimony had a natural tendency to influence, impede and dissuade the Grand Jury from pursuing its investigation (Respondent's Brief in Opposition, p. 7). The authority for this rule is *Carroll* v. *United States* (C. C. A. 2, 1927), 16 F. (2d) 951 cert. den. 273 U. S. 763. Although the *Carroll* case contains such language, the decision in the case does not justify any such broad rule (see Petition, pp. 13-14). The other two cases cited by respondent, *Blackmon* v. *United States* (C. C. A. 5, 1940), 108 F. (2d) 572, and *United States* v. *Slutzky* (C. C. A. 3, 1935), 79 F. (2d) 504, are concerned with perjury committed on a trial before a petit jury and not in grand jury proceedings. Neither of them lays down any such broad rule.

The language of the *Carroll* case was relied on and quoted by the Circuit Court for the Second Circuit in its opinion in this case. An application of that language to the facts of *Clayton* v. *United States,* supra, demonstrates that the *Clayton* case and the instant case are in definite,

irreconcilable conflict. Had Clayton admitted his intoxication, the Grand Jury would at once have inquired into the source of the intoxicating liquor, the very subject of the entire Grand Jury inquiry. Clayton's false testimony inevitably had a natural tendency to influence, impede and dissuade that Grand Jury from pursuing its investigation. Under the test of the *Carroll* case as adopted by the Circuit Court for the Second Circuit in its opinion in the instant case, Clayton's false testimony was inescapably on a material matter.

CONCLUSION

The instant case presents a fundamental problem of law never passed on by this Court, and is in conflict with the rule of the Fourth Circuit. For these reasons, and those set forth in the petition herein, it is urged that the questions presented and the conflict of opinion with respect to them require the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

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